

More Than IndyRef2? The Referendums (Scotland) Act 2020

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Abstract

Demands for a second Scottish independence referendum have persisted since 2014. The Scottish government introduced the Referendums (Scotland) Bill at Holyrood in May 2019 to enable referendums within the competence of the Scottish parliament. The Scottish National Party (SNP) government presented this as a framework enabling a range of referendums. Opponents saw this as legislating for a second independence referendum. The act will form a large part of the legal framework and rules for any second independence referendum. Importantly, the legislation provides innovation in electoral law more generally. This article discusses the background to the bill, its initial contents, and debates around and amendments to the bill. It discusses its electoral law innovations, before considering its limitations and place as constitutional debates play out over a second independence referendum.

Keywords: Scotland, independence, referendums, electoral law, indyref

Introduction

SINCE THE 2014 Scottish independence referendum there have been calls for a second referendum. First Minister, Nicola Sturgeon, initially called for a second independence referendum in March 2017. In April 2019, she promised to introduce legislation to provide for any referendum which fell within the Scottish parliament's competence. The Referendums (Scotland) Bill was introduced on 29 May 2019. It received royal assent on 29 January 2020, against a backdrop of increased constitutional conflict over independence.

This article examines the Referendums (Scotland) Act 2020. It was argued to be about more than Indyref2, aiming to provide broader framework legislation to regulate and hold Scottish referendums, and several aspects were controversial. Nonetheless, the Scottish government proved amenable to improving the bill, with major changes being made during the legislative process. The legislation has also made several innovations in electoral law more generally.

The first part discusses the bill's background. The second section examines its initial provisions and scrutiny of the bill. The third part describes the subsequent debates

and amendments during the legislative process. The fourth part outlines the final act, and discusses its innovations and limitations. The conclusion briefly reflects upon the act's place in the aftermath of the 2019 general election and subsequent demands for a second independence referendum.

Background

On 18 September 2014, with a record turnout of 84.6 per cent, Scottish electors voted against the proposition 'Should Scotland be an independent country?', by 55.5 per cent to 44.5 per cent. The referendum had been one outcome of the Scottish National Party's (SNP) majority in the 2011 Scottish parliament election. Nonetheless, the Scottish parliament did not have the appropriate devolved powers to call such a referendum; such matters were seen as reserved to Westminster. A section 30 Order giving power to Holyrood to legislate was agreed with the October 2012 Edinburgh Agreement providing the basis for the independence referendum.

The Scottish parliament was granted control over key aspects, including the referendum date, question wording, and the franchise. The Scottish Independence Referendum Act

(SIRA) received royal assent on 17 December 2013, while the Scottish Independence Referendum (Franchise) Act became law in August 2013. The process leading to SIRA was claimed to be a 'gold standard' in such legislation.¹ The Franchise Act enabled 16–17 year olds to register to vote for the referendum, something implemented subsequently for Scottish parliament and council elections. SIRA was nonetheless intended to be used only for the independence referendum.

The 2016 SNP manifesto claimed that 'significant and material change in the circumstances that prevailed in 2014, such as Scotland being taken out of the EU against our will' would provide circumstances for a second independence referendum. Scotland voted to remain in the EU in the 2016 Brexit referendum. With Green Party support, the SNP won a Scottish parliament vote on 28 March 2017, allowing First Minister Sturgeon to request, unsuccessfully, a section 30 Order to hold a second independence referendum. Brexit uncertainty provided further reason for Nicola Sturgeon to call for a second independence referendum on 24 April 2019. She promised to introduce legislation to provide rules for any referendum within the competence of the Scottish parliament, to be passed by the end of 2019. She was clear that a further section 30 Order would be needed to put any independence referendum 'beyond doubt or challenge'.²

Initial provision and scrutiny

The Referendums (Scotland) Bill was introduced by Michael Russell, Cabinet Secretary for Government Business and Constitutional Relations, on 28 May 2019. It drew extensively on both SIRA 2013 and on Part 7 of the UK-wide Political Parties, Elections and Referendums Act (PPERA) 2000.³ It covered numerous highly technical aspects of holding referendums, broadly covering the framework, electoral administration, and campaign rules and regulation.

It proposed that the Scottish government be able to introduce specific referendums by secondary legislation. This would include the referendum date, the referendum regulated period, and the question and answer options. The Electoral Commission would be

consulted prior to laying these regulations, which would be subject to the Scottish parliament's affirmative procedure. The Electoral Commission was to report on the intelligibility of any question, with the exception of one which it had previously evaluated. The franchise would be the local government register, which the Scottish parliament had power over.

Like SIRA, the convener of the Scottish Electoral Management Board would be Chief Counting Officer (CCO) responsible for delivery of the referendum, with the Electoral Commission handling campaign regulation, and providing general advice on conduct. Voting procedures relied heavily on standard practices and, having been used in recent referendums, were well understood. The Bill provided for registration of campaign organisations, and set limits and reporting requirements for spending and donations. The spending limit for designated lead campaign organisations was £1.5 million. It provided for a twenty-eight day 'purdah' period restricting public bodies publishing information related to the referendum, and introduced digital imprint rules to aid transparency in online campaigning. It contained a range of offences, and specified the investigatory and enforcement powers of the Electoral Commission.

The bill was assigned to the Scottish parliament's Finance and Constitution Committee (FCC) for stage 1 scrutiny. FCC took a highly consensual approach to scrutiny, with members focussed clearly on improving the bill's provisions. The parliament's Delegated Powers and Law Reform (DPLR) Committee also reported on the bill. Evidence was consistently supportive of the general policy aim to create framework legislation for running referendums. Three areas received extensive consideration: legislating for referendums by secondary legislation; referendum question testing; and the timings, or lack thereof, set out for the various parts of the referendum process.

Section one proposed that Scottish ministers legislate by regulations to introduce a referendum. There was some precedent: important parts of the EU referendum were enacted by secondary legislation, including the referendum date, the referendum period,

and reporting and spending periods during the campaign.⁴ The regulations would also set out the referendum period. The section required the Electoral Commission to be consulted before regulations were laid before the Scottish parliament. These regulations were to be subject to the Scottish parliament's affirmative procedure, giving the committees involved forty days to recommend approval to parliament. Parliament would not be able to make amendments, but only to approve or reject the proposed regulations.

The perceived lack of scrutiny and powers this gave to ministers was heavily criticised. Scottish government officials explained that the proposals would provide certainty in the legislative time-frame for any referendum. The Cabinet Secretary, Michael Russell MSP, did not seriously appear to defend this position, conceding that there would be cases where primary legislation was necessary, most likely for referendums on major decisions, including those requiring a section 30 Order.

Referendum question testing attracted controversy because the requirement for the Electoral Commission to report on intelligibility would not apply where it had already reported on the question, or it had recommended the wording. The only case where this applied was the question put in the Independence Referendum of 2014: the Commission had recommended the eventual question put to voters 'Should Scotland be an independent country?', which differed from the Scottish government's original formulation.⁵

Critics perceived this as an attempt to ensure the same 2014 question was used in any future independence referendum. They suggested that understandings could change, while some observed that a rewording of any question to leave/remain, as in the 2016 EU referendum, might favour the Union more than the yes/no answer used in 2014. The Electoral Commission 'firmly recommended' it be required to report on any question regardless of whether it had previously evaluated it. The Cabinet Secretary countered consistently that the existing question was actually a current question, asked continually in opinion polls and that changing the question might confuse voters.⁶

Issues of timing were relevant throughout, not least because of the aim to hold a second independence referendum by the end of 2020. In particular, the bill did not legislate for a specific regulated referendum period. PPERA 2000 provided for a ten-week minimum. Practice had varied: the 2016 EU referendum had a ten-week period, while SIRA had a sixteen-week period. In electoral administration, the Gould report into problems in the 2007 Scottish elections became a focus. Gould suggested a six-month period was necessary between passing new electoral law and running a poll under that legislation.⁷ Witnesses supported both points. While the Cabinet Secretary was open to specifying a minimum referendum period, he was 'not absolutely committed to six months' in relation to Gould.⁸

Other issues received scrutiny: digital imprints and campaigning were discussed; the Electoral Commission's enforcement powers were examined; accounting for donation and campaign spending limits, regulation of such financial issues and how campaigns could check donation admissibility were considered; whether purdah restrictions should be extended to the full regulated campaign period were examined, as was providing public funding to campaign organisations. Electorate and turnout thresholds were also raised, with one petitioner suggesting a two-thirds majority be necessary for any referendum on constitutional change.

Recommendations, debates and amendments

Both DPLR and FCC Committees' stage 1 reports were unanimous in their recommendations. DPLR focussed on whether referendums should be called by primary or secondary legislation.⁹ As lead committee, FCC's recommendations were consensual and wide-ranging. FCC supported the bill's policy objectives. It suggested that all constitutional referendums require primary legislation, with all others ordinarily also requiring primary legislation. It agreed that there should be a minimum regulated period of ten weeks and recognised that adequate time was needed for regulators, electoral

administrators and campaigns. On question testing, it recommended that the Cabinet Secretary recognise the weight of evidence and reach agreement with the Electoral Commission. FCC recommended that referendums be standalone events. It found no evidence to support electorate or turnout thresholds.

On campaign regulation, FCC recommended amendment to remove a potential loophole on digital imprints. Further recommendations were aimed at getting the Scottish government to reconsider campaign spending and donation limits, the ability to check permissibility and compliance from donors from outside both Scotland and the UK, as well as organisations which may be spending prior to a regulated campaign period. It argued there was insufficient evidence to support public financing for campaigns. Finally, it asked the Scottish government to respond to the Electoral Commission's views on enforcement, including that it be allowed to increase its maximum fine to £500,000.¹⁰

After the consensual committee process, the stage 1 debate on 7 November saw politics reassert itself. This was notable for the division between pro-union MSPs who interpreted the bill as only about enabling a second independence referendum, and pro-independence MSPs, who also underlined the framework nature of the bill, permitting a broader range of referendums. These constitutional tensions had little impact on the substance of the bill and the improvements already suggested. The Cabinet Secretary indicated considerable movement and began by accepting many of FCC's recommendations. These included that: primary legislation be required for constitutional matters, and normally for other referendums; there be a ten-week minimum regulated period; electoral administrators should have the necessary time and resources; the digital imprint loophole be removed; and the Electoral Commission's maximum fine be increased to £500,000. He underlined the framework nature of the bill, noting that future Scottish referendums would only require a short bill, since key provisions about delivery and regulation had already been made. An amendment would be lodged, restricting the shelf life of a referendum question to two parliamentary terms. The bill was passed at stage

1 with sixty-five for (comprised of pro-independence SNP and Green MSPs), fifty-five against (Conservative, Labour and Liberal Democrat MSPs), and no abstentions.

Numerous stage 2 amendments were tabled, with many technical amendments agreed unanimously. The bill was amended to require primary legislation for constitutional and major referendums. A 'validity period' of two Scottish parliament terms was inserted on question testing. However, there remained extensive opposition to the Scottish government's position on question testing. The referendum period was set at ten weeks. A loophole requiring imprints unless 'reasonably practical' was removed to ensure it could not be exploited by digital platforms. A code of practice for electoral observers was added, bringing consistency with council elections. The duty to encourage participation was extended from counting officers to electoral registration officers. Technical changes were made to proxy voting, publication of the electoral register, and recording some campaign expenses. Donation and transaction reporting intervals in the referendum period were tightened to four-weekly. The range of people who could be served disclosure notices by the Electoral Commission was widened, and the maximum fine that could be levied increased to £500,000. The period in which a judicial review of the result could be requested was extended from six to eight weeks.

Most stage 2 amendments were passed unanimously after substantial movement by the Scottish government. One that was not was tabled by Labour's James Kelly. His amendment 106 sought to give Scottish public authorities the power to encourage electors to vote in any referendum, and to promote awareness and understanding of how to register and vote. This was opposed by the Cabinet Secretary, but passed nonetheless by six votes to five.

Stage 3 further amended the bill. The major change enshrined the standalone nature of any referendum, and also provided for the date of a referendum to be changed if a clash developed with a UK general election. The bill was passed on 19 December as the parliament's last decision in 2019. There were sixty-eight votes in favour (SNP and Green), fifty-four against (Conservatives,

Labour and Liberal Democrats), with two abstentions from Labour MSPs.

Innovations and limitations in electoral law

There are several noteworthy developments in the act. Firstly, it differs from PPERA 2000. PPERA provides some legislation for holding UK-wide referendums, for example on campaign regulations, but leaves much to be decided by subsequent primary legislation. Although the Referendums (Scotland) Act also requires primary legislation for most referendums, its framework of detailed provision for electoral administration and campaign conduct and regulation means that any subsequent primary legislation should be relatively short.

Secondly, the Electoral Commission has regularly expressed concern that its maximum fine for an individual offence of £20,000 (£10,000 in Scotland) was being treated as a 'cost of business' by party and campaign organisations. The Commission argues that its powers have not kept pace with other regulators, such as the Information Commissioner, and that significant fines are required as a deterrent.¹¹ The Scottish government's acceptance of these points serves to differentiate Scottish practice from Westminster requirements. It also sets UK-wide precedent.

Thirdly, the Act's provision for digital imprints put it ahead of UK-wide practice. The Commons' Digital, Media, Culture and Sport Committee twice called for urgent reform of online campaigning during 2019 and proposals from the UK government were still awaited when the Referendums (Scotland) Act became law. FCC discussed freedom of speech, difficulties of regulating individual opinions, the potential for loopholes to be exploited, and difficulties in identifying organised online campaigns. That the original bill's exemption for including imprints where 'not reasonably practicable', was removed, potentially eliminated a loophole that might have been exploited by online platforms. The act specifies that imprint requirements do not apply when personal opinions are being expressed, on an individual's behalf and non-commercially. This sought to set boundaries to a complex, fast-developing area more generally.

Finally, the addition of section 25 (2) was significant. This ensures that Scottish public authorities encourage people to register to vote, to participate, and to promote public awareness. No such provision has existed in previous referendum legislation in the UK, creating Scottish precedent in this area.

Nonetheless, the act has limitations. By requiring primary legislation, future referendums will attract a range of amendments. These may reopen issues already discussed, but not included, in the act such as thresholds, the franchise, conduct, and campaign rules. The act is therefore not the last word. The legislative process around any short referendums bill is likely to be extended and more detailed as a result.

There is also a potential regulatory gap. The act applies in Scotland, to Scottish referendums, yet, donations and online communications might originate from outside Scotland, particularly from elsewhere in the UK. Consequently, the enforceability of any transgressions may be limited. The ability to check the permissibility of donations may also be affected. FCC discussed the bill's ability to regulate donations and spending. Some changes were made to donation and spending reporting. It was generally acknowledged that these were areas that needed to be kept under review, but the bill was limited in what it could achieve. Similarly, with digital imprints, the act will likely struggle to keep pace with technology.

Finally, the act cannot bind UK-level institutions. In a referendum with a UK-wide element, any 'purdah' rules would, as in 2014, rely on negotiated agreement between the Scottish and UK governments. Relations between the two governments are currently marked by distrust, making any such agreement difficult to reach.

Conclusion

The Referendums (Scotland) Act 2020 is a significant piece of electoral legislation. Not only will it govern any future Scottish independence referendum, and any other referendum within the competence of the Scottish parliament, but it also sets precedent in various areas of electoral law. There is more to the act than just IndyRef2.

The act's provisions have already shaped behaviour. In announcing that the Scottish government would ask the Electoral Commission to report on the intelligibility of the referendum question in a speech on 31 January 2020, Nicola Sturgeon directly acknowledged the parliament's will on question testing.¹² A decision on this and work on any referendum in 2020 was paused during the coronavirus crisis, but is likely to return in the future. None of this answers the question of whether a section 30 Order is needed to hold a second independence referendum, whether it will be granted by the UK government, and what the SNP, Scottish government, and broader independence movement will do if it is not. This is a matter of politics, as much as law. But whether a s.30 Order is granted, or some form of consultative referendum organised, the Referendums (Scotland) Act 2020 will be central to the process and outcome.

Notes

- 1 Scottish Parliament, *Official Report*, 24 April 2019, Col. 6.

- 2 Ibid.
- 3 Policy Memorandum, paras 10 and 12.
- 4 The European Union Referendum (Date of Referendum etc.) Regulations 2016.
- 5 Electoral Commission, *Referendum on Independence for Scotland: Advice of the Electoral Commission on the Proposed Referendum Question*, Electoral Commission, Edinburgh/London, 2013.
- 6 Finance and Constitution Committee, *Official Report*, 25 September 2019, cols. 9–16.
- 7 Electoral Commission, *Scottish Elections 2007: The independent Review of the Scottish Parliamentary and Local Government Elections*, Edinburgh/London, Electoral Commission, 3 May 2007.
- 8 Finance and Constitution Committee, *Official Report*, 25 September 2019, cols. 6 and 18.
- 9 Delegated Powers and Law Reform Committee, *Referendums (Scotland) Bill: Stage 1*, Edinburgh: Scottish Parliament SP Paper 577, 2019.
- 10 Finance and Constitution Committee, *Stage 1 Report on the Referendums (Scotland) Bill*, Edinburgh, Scottish Parliament SP Paper 607, 2019.
- 11 Finance and Constitution Committee, *Official Report*, 18 September 2019, col. 24.
- 12 N. Sturgeon, 'Statement on Scotland's future', Scottish National Party, 2020; <https://www.snp.org/nicola-sturgeons-statement-on-scotlands-future/> (accessed 6 February 2020).